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No. 83-1652

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PAPAGO TRIBAL UTILITY AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND ARIZONA PUBLIC SERVICE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 10, 1984

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Federal Energy Regulatory Commission's determination that the contract for the sale of electricity involved in this case contemplated changes in rates under the "just and reasonable" standard of Section 206 of the Federal Power Act.

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Arizona Public Service Company (APS),[1] an intervenor in support of respondent Federal Energy Regulatory Commission (Commission) below, submits this brief in opposition to the petition for a writ of certiorari.

[1] The list of parties supplied by petitioner is correct. In accordance with Rule 28.1 of this Court, a complete listing of all parent companies, subsidiaries, and affiliates of respondent Arizona Public Service Company follows: APS Finance Company, N. V.; APS Foundation, Inc.; APS Fuels Company; Bixco, Incorporated; El Dorado Investment Company; Energy Development Company; Malapi Resources Company; and Phoenix Plaza Properties, Inc.

OPINIONS BELOW

An adequate reference to the opinion delivered by the court of appeals below and by the Federal Energy Regulatory Commission is made in the petition. The opinion of the court below is reported in *Papago Tribal Utility Authority* v. *FERC*, 723 F.2d 950 (D.C. Cir. 1983), *reh. denied*, Jan. 12, 1984.

JURISDICTION

The petition correctly states the grounds on which the jurisdiction of this Court rests.

STATUTE INVOLVED

In addition to the provisions cited by petitioner, Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), is involved in this case. That section provides, in pertinent part, that, upon review by a court of appeals,

> [t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

The full text of Section 313(b) of the Act is set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner seeks review of an opinion of the Court of Appeals for the District of Columbia Circuit affirming a decision by the Federal Energy Regulatory Commission approving a wholesale rate increase sought by APS from its wholesale customers. One of those customers is the Papago Tribal Utility Authority (PTUA), petitioner in this case. The Commission found in the order on appeal here that the proposed increase was just and reasonable, that the existing rates being collected from PTUA were

so low as to be unjust and unreasonable, and that the contract contemplated an adjustment in wholesale rates upon the making of such a finding.

This proceeding was instituted on February 26, 1976, when APS filed an application for a rate increase with the Federal Power Commission, predecessor to the present agency. The amount of the increase was approximately $4.5 million annually. The Commission accepted the new rates for filing, suspended their operation for 30 days, and set the matter for hearing. In its suspension order, the Commission held, over the objection of PTUA, that PTUA's contract with APS authorized the unilateral filing of proposed changes in rates by APS pursuant to Section 205 of the Federal Power Act, 16 U.S.C. § 824d. It rejected PTUA's contention that the rates could only be changed pursuant to Section 206 of the Act, 16 U.S.C. § 824e, which authorizes the Commission to prescribe rates to be thereafter observed if it finds the existing rates to be unjust and unreasonable.

PTUA appealed that ruling to the Court of Appeals for the District of Columbia Circuit, which held that PTUA's contract did not authorize rate filings under Section 205 of the Act. The appellate court remanded the matter to the Commission for a determination of the appropriate standard of proof to be applied in seeking a rate change under Section 206. *Papago Tribal Utility Authority* v. *FERC*, 610 F.2d 914, 930 n.127 (1979) *(Papago I)*.

While PTUA's appeal was pending before the court, the Commission proceeded under its original hearing order and ultimately approved APS' proposed rates as just and reasonable, subject to several minor adjustments. *Arizona Public Service Company*, 4 FERC (CCH) ¶ 61,101 (Aug. 1, 1978). Upon consideration of the

D.C. Circuit's remand of *Papago I*, the Commission concluded that PTUA's contract with APS only authorized rate changes pursuant to the just and reasonable standard of Section 206 of the Act. The Commission held that APS' contract with PTUA was not a fixed rate contract, but rather allowed APS to file for increased rates at the Commission with any increase to apply prospectively only upon a showing that the present rates were unjust and unreasonable. The Commission rejected PTUA's request that another hearing on this matter be held, on the ground that it would be duplicative and wasteful of the Commission's and the parties' resources, since the underlying test period data had already been examined at the first hearing. The Commission explicitly found that APS' pre-existing rates were unjust and unreasonable, inasmuch as they would allow APS to earn a rate of return of only .522 percent, and made the new just and reasonable rates effective August 1, 1978, the date of the previous rate determination, so as to put the parties in the same position they would have been in if the Commission had correctly interpreted the PTUA contract in the first place. *Arizona Public Service Company*, 18 FERC (CCH) ¶ 61,066 (Jan. 25, 1982).

PTUA again appealed the Commission's decision to the court of appeals. Disputing the Commission's interpretation of the contract, PTUA argued that the contract provided a fixed rate subject only to modification where the rate could be found to be so low as to affect adversely the public interest. PTUA also argued that the Commission erred in making the new just and reasonable rate effective on August 1, 1978, the date of the Commission's order establishing the new rates. PTUA urged that another evidentiary hearing should have been held, with the new rate being applied prospectively only from the date of the Commission's order following that hearing.

The court of appeals affirmed the Commission's order in its entirety. The court reviewed the statutory basis for changing rates under the Federal Power Act, Sections 205 and 206. The court noted that there are essentially three arrangements by which parties can agree to rate revisions. *First*, the parties may agree that a utility may unilaterally file rate changes under Section 205 of the Act, subject to the Commission's power to suspend the increased rates and make them effective subject to refund during an investigation of their reasonableness. *Second*, the parties may agree to eliminate the utility's right to file unilaterally increased rates under Section 205 of the Act and the Commission's right to impose changes under Section 206,[2] except that the parties may not limit the indefeasible right of the Commission to impose rates where necessary to protect the public interest. *Third*, the parties may agree to eliminate the utility's right to make immediately effective rate changes under Section 205 of the Act, but leave unchanged the Commission's power under Section 206 to replace not only rates that are contrary to the public interest but also rates that are unjust, unreasonable, or unduly discriminatory.

The court, while giving proper deference to the Commission's ruling, undertook its own examination of the APS-PTUA contract to determine which of the three types of rate change provisions it contained. The court reviewed Section 3, Subsection 6 of the agreement, which provides:

> The rates hereinabove set out in this Section 3 . . . are to remain in effect for the initial one (1) year of the term of this contract and thereafter unless and

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[2] This restriction is known as the *Mobile-Sierra* doctrine, which arises from the decisions in United Gas Pipe Line Co. *v.* Mobile Gas Service Corp., 350 U.S. 332 (1956), and FPC *v.* Sierra Pacific Power Co., 350 U.S. 348 (1956).

> until changed by the Federal Power Commission or other lawful regulatory authority, with either party hereto to be free unilaterally to take appropriate action before the Federal Power Commission or other lawful regulatory authority in connection with changes which may be desired by such party.

The court noted, as did the Commission, that the contract draws a clear distinction between "the initial one (1) year," during which the initial rates "are to remain in effect," and subsequent years during which those rates remain in effect "unless and until changed by the Federal Power Commission or other lawful regulatory authority, with either party hereto to be free unilaterally" to seek such changes as it may desire. The court concluded that the contract only permitted changes that are necessary in the public interest during the first year, but that the parties intended a less restrictive standard, *i.e.*, changes that are just and reasonable, in the years thereafter. The court rejected PTUA's claim that the Commission should have considered extrinsic evidence in construing the contract, and that the court's earlier decision in *Papago I* had restricted rate changes under the contract to those that meet the stringent public interest standard of Section 206, rather than the just and reasonable standard.

Next, the court examined PTUA's allegations that the Commission had erred in holding that the existing rates were unjust and unreasonable because they would allow APS to earn only a .522 percent rate of return. PTUA challenged the finding on procedural grounds because it was based upon data contained in a compliance filing made by APS after the Commission's initial rate determination. The court noted that PTUA did not challenge the accuracy of the data, the principles applied, or the accuracy of the computations. The court also observed that PTUA could have challenged any ir-

accuracies in APS' compliance filing when it was made, but chose not to do so. The court noted that even on appeal PTUA did not claim that the pre-existing rates were just and reasonable. In view of these facts, the court found that the Commission had not erred in finding the pre-existing rates unjust and unreasonable.

Finally, the court analyzed PTUA's allegations that the Commission had no power to make the just and reasonable rates effective on August 1, 1978, the date of its prior rate determination, because of the rule against retroactive ratemaking. The court examined the Commission's reasoning that the effect of this action was to place the parties in the same position they would have been in if the Commission had correctly interpreted the PTUA contract in the first place. The court noted that the Commission had not made explicit findings of the unlawfulness of the pre-existing rate in its prior order, but that it had done so on January 25, 1982, in its order on remand from *Papago I*.

In 1978, the Commission had made findings that 9.41 percent return overall was a just and reasonable rate. In so doing, the Commission left undisturbed the administrative law judge's finding that a 4.35 percent return was unjust and unreasonable. The Commission found that the existing rates of customers deemed to be under Section 206 at that time were unjust and unreasonable, although it did not include PTUA within this group because it mistakenly believed PTUA's contract to be governed by Section 205. In its order on remand in 1982, after concluding that PTUA's contract provided for a change in rates on a showing that the existing rates were unjust and unreasonable under Section 206, the Commission determined that APS was earning only a .552 percent return from PTUA, and that this was unjustly low.

In reviewing the Commission's determination, the court of appeals noted that there was sufficient evidence in the record to conclude that the existing rates were unjust and unreasonable, and stated that there was ample evidence to conclude that the Commission would have treated PTUA similarly to the other Section 206 customers, similarly affected by the prior order, if it had known that PTUA was properly included in that group. The court also held that the 1800 percent differential between the .552 percent return and the 9.41 percent return was so great that .552 percent could not be within the zone of reasonableness. Thus, after carefully examining the Commission's order and PTUA's challenge to it, the court concluded that the Commission had not abused its discretion on the record before it and denied PTUA's petition.

SUMMARY OF ARGUMENT

In this case the court of appeals approved the judgment of the Commission as to the applicable standard of proof required to approve a rate change under Section 206 of the Federal Power Act. Two other courts of appeals have affirmed the judgment of the Commission in similar cases, *Public Service Co. of New Mexico* v. *FERC*, 628 F.2d 1267 (10th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); *Louisiana Power & Light Co.* v. *FERC*, 587 F.2d 671 (5th Cir.), *reh. denied*, 590 F.2d 333 (1979). Thus, there is no conflict among the circuits requiring this Court's attention. In addition, the court below applied the same standard in a companion case decided the same day, *Kansas Cities* v. *FERC*, 723 F.2d 82 (D.C. Cir. 1983).

On the merits, the standard applied by the Commission is the correct one. It is derived from the underlying statute, is fully in accord with settled legal principles, and does not conflict with the decisions of this Court or other

courts of appeals. Contrary to PTUA's suggestion, the issue presented below is unlikely to have much impact since the relatively few contracts similar to the one at issue here are unlikely to be renewed once they expire. The vast majority of wholesale contracts subject to the Commission's authority permit rate changes under Section 205 of the Federal Power Act. A writ of certiorari should be granted only for cases of "peculiar gravity and general importance," *American Construction Co.* v. *Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372 (1893), which this case is not and thus does not warrant further review.

ARGUMENT

1. There Is No Conflict Among The Circuits

In addition to the court below, two other circuits have addressed the issue presented here and each has reached the same conclusion. In *Public Service Co. of New Mexico* v. *FERC*, *supra*, the Tenth Circuit held that contract language stating that "[t]his contract . . . shall at all times be subject to such changes or modifications as shall be ordered from time to time by any legally constituted regulatory body" did not create a fixed rate contract, and that the just and reasonable standard of Section 206 should apply. Similarly, in *Louisiana Power & Light Co.* v. *FERC*, *supra*, the Fifth Circuit affirmed the Commission's holding that contract language "subject to amendment or alteration . . . in accordance with a[n] . . . order of any governmental authority" permitted rate changes under the just and reasonable standard of Section 206 of the Act. The contractual language presently before the Court is in substance virtually identical to the language in these two cases: "The rates hereinabove set out . . . are to remain in effect . . . unless and until changed by the

Federal Power Commission or other lawful regulatory authority." Accordingly, there is no conflict among the circuits requiring resolution by this Court.

II. The Opinion Below Does Not Conflict With Supreme Court Precedent

The decisions of the court of appeals and of the Commission comport with the decisions of this Court. The decisions do not, in any manner, conflict with this Court's established precedents. In reviewing the case below, the court of appeals properly exercised its judicial duties in reviewing the decision of the administrative agency pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b)

A. The court of appeals applied the correct scope of review and accorded appropriate deference to the judgment of the administrative agency

In reviewing the decision of the Commission on the standard of proof which APS must meet to secure a change in the rates for service rendered to PTUA, the court of appeals accorded correct deference to the decision of the administrative agency which must construe, practically on a daily basis, the meaning of contracts for the sale of electric energy. Specifically, the court of appeals accorded the Commission

> appropriate deference, though not of course conclusive validity, to the judgment of the expert agency that deals with such contracts regularly.

App. p. 30, 723 F.2d at 953 (citation omitted).

The foregoing is the correct standard of review where technical contracts are involved. In particular, with regard to issues of contractual interpretation pertaining to the application of the *Mobile-Sierra* doctrine, it is proper

to defer to the Commission's expertise if its decision is "amply supported both factually and legally." *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114 (1958), *reh. denied*, 358 U.S. 942 (1959). *See also Gulf States Utilities Co.* v. *FPC*, 518 F.2d 450, 457 (D.C. Cir. 1975). Contemporaneous with the decision below, the District of Columbia Circuit applied that same standard of review in *Kansas Cities* v. *FERC*, *supra*.

The appellate decision also reveals that the court of appeals undertook a detailed analysis of the contractual provisions and conducted a thorough review of the principles of the *Mobile-Sierra* doctrine as they pertain to the contract in dispute. The court's decision is correct as a matter of contract law, as well as to scope of review, and does not require the attention of this Court.

B. The decisions below have not deviated from this Court's precedents in *Mobile* and *Sierra*

The Federal Power Act contains two provisions governing rate changes by electric utilities subject to its jurisdiction. Section 205 provides for rate changes initiated unilaterally by the utility. The Commission may suspend the proposed rates for up to five months pending an investigation of their reasonableness. At the end of the suspension period the new rates take effect subject to refund and the ultimate determination of their justness and reasonableness. In contrast, Section 206 of the Act contemplates rate changes initiated by the Commission itself (although usually at the request of one of the contracting parties, as permitted by the contract in this case). Under Section 206, the Commission may investigate a utility's existing rates and if it finds them to be unjust and unreasonable, replace them with just and reasonable rates.

This Court ruled in *FPC* v. *Sierra Pacific Power Co.*, *supra*, that a utility may bargain away its right unilaterally to file revised rates under Section 205 of the Act, although the duty of the Commission under Section 206 to replace rates that are contrary to the public interest is indefeasible. A similar rule applies to gas contracts. *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*.[3] There is nothing inconsistent with the *Mobile-Sierra* doctrine and the contract in this case whereby the parties have agreed to eliminate the utility's right to file new rates under Section 205, but have left unaffected the Commission's power to replace unjust and unreasonable rates under Section 206 upon request of one of the parties. Under this procedure, the new rates take effect only after a Commission determination of their lawfulness. Unlike the contract involved in the *Sierra* case, the contract between APS and PTUA specifically provides for rate changes initiated by either party after the first year.

APS' contract with PTUA distinguishes between "the initial one (1) year" during which the rates set forth in other provisions of the contract are to remain in effect, and the subsequent years during which those rates were to remain in effect until changed by the Federal Power Commission or other lawful regulatory authority. The contract expressly provides that either party is free to seek such changes. The Commission concluded from this language that the parties had agreed to permit such changes after the first year of the term of the agreement should the existing rates become unjust and unreasonable. The court of appeals correctly recognized that imposition of the strict "public interest" standard re-

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[3] This case interpreted Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717d, provisions that parallel Sections 205 and 206 of the Federal Power Act.

quired under *Sierra* type contracts would effectively preclude any change in the contract rate, thereby nullifying that portion of the contract.

Inasmuch as the *Mobile-Sierra* doctrine pertains to fixed rate contracts, the court of appeals cannot be said to have deviated from the precedents of this Court in affirming the Commission's determination that the just and reasonable standard should be applied to a contract with a rate change provision.

C. The decision below properly affirmed the Commission's correction of its previous error

Several of PTUA's other contentions can be disposed of quickly. First, this case does not involve issues of retroactive ratemaking. The Commission erred in its interpretation of the PTUA-APS contract and was corrected by the court of appeals in *Papago I*. On remand, while the record remained open, the Commission placed the parties in the same position they would have been in if the error had not been made. The Commission did not indulge in retroactive ratemaking, it simply corrected an error it had made. As this Court stated in *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223, 230 (1965), *reh. denied*, 382 U.S. 1001 (1966), "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." Furthermore, "[t]o deny the Commission authority to correct its errors on remand is effectively to negate judicial review of the Commission's substantive determinations." *Houston Lighting & Power Co.* v. *United States*, 606 F.2d 1131, 1143 (5th Cir. 1979), *cert. denied*, 440 U.S. 1073 (1980). *See also Tennessee Valley Gas Municipal Association* v. *FPC*, 470 F.2d 446, 453 (D.C. Cir. 1972).

The cases cited by PTUA for the proposition that the order below violates the filed rate doctrine are not on point. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), involved a state court suit seeking damages for breach of contract. It was an action clearly outside of the record in any rate case. *Southern Union Gas Co.* v. *FERC*, 725 F.2d 99 (10th Cir. 1984), involved an explicit attempt by the Commission to make an exception to the filed rate doctrine for what it considered to be egregious conduct. The instant case involves a rate proceeding for which the record was not closed at the time the Commission corrected its error, unlike *Southern Union*. There was neither any egregious conduct nor any attempt by the Commission to make an exception to the filed rate doctrine. *Southern Union* is simply inapposite.

Finally, the court of appeals did not err in affirming the Commission's finding that the existing rates were unjust and unreasonable, and in finding that such a holding would have been made in 1978, as in fact it was with respect to the Company's other Section 206 customers, if the Commission had known that PTUA was a Section 206 customer. The court of appeals considered this Court's holding in *Sierra*, which directed the appellate courts to look to the substance of the requirements of Section 206 rather than to its rigid formalities, and held that the substance of a finding of unjustness and unreasonableness was adequately made in 1978 in the Commission's order establishing just and reasonable rates. In view of the Commission's explicit finding at that time with respect to other customers whose contracts with APS had been determined to fall within the category of Section 206, there was ample evidence to support its decision to make PTUA's new rates effective August 1, 1978.

CONCLUSION

The court of appeals applied the correct standard of review, did not substitute its judgment for that of the agency, assured itself that there was substantial evidence to support the Commission's findings, and closely examined the Commission's reasoning. Nothing more was required. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

The full text of Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), follows:

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the

modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certifications as provided in sections 346 and 347 of Title 28.